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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 163

J. FRIEDMAN, SYDNEY C. JOHNSON, C. O. MOON, L. BAKER MOON, E. T. DAVIS, JR., J. R. WOODWARD, GEORGE DODYS, DEWITT T. MARTIN, AUGUSTUS C. BURTON, S. C. KLOTZ, C. V. MASON, J. H. MOORE, W. S. VENABLE, B. L. GARRETT, WALTER ANDERSON, G. J. LIMBERT, L. J. SMITH, J. G. BISHOP, M. HANKIN and N. C. COOPER, Petitioners,

versus

CITY OF ATLANTA, WILLIAM B. HARTSFIELD, as Mayor of the City of Atlanta, and M. A. HORNSBY, as Chief of Police of the City of Atlanta, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

YOUNG H. FRASER,
Counsel for Petitioners.

Of Counsel:
FRASER, IRWIN & LATIMER.

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SUPREME COURT OF THE UNITED STATES

October Term, 1940

No.....

J. Friedman, Sydney C. Johnson, C. O. Moon, L. Baker Moon, E. T. Davis, Jr., J. R. Woodward, George Dodys, DeWitt T. Martin, Augustus C. Burton, S. C. Klotz, C. V. Mason, J. H. Moore, W. S. Venable, B. L. Garrett, Walter Anderson, G. J. Limbert, L. J. Smith, J. G. Bishop, M. Hankin and N. C. Cooper, Petitioners,

versus

City of Atlanta, William B. Hartsfield, as Mayor of the City of Atlanta, and M. A. Hornsby, as Chief of Police of the City of Atlanta, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

Petitioners herein, J. Friedman, et al, as listed above, by their counsel, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in the above cause on the 26th day of March, 1940, overruling a judgment of the Fulton Superior Court, of Atlanta, Georgia.

JUDGMENT BELOW.

The judgment of the Supreme Court of Georgia was entered on March 26th, 1940, and is reported at 189 Ga. 862 (7 S. E. 2nd 911).

JURISDICTION.

The judgment of the Supreme Court of Georgia was entered on March 26th, 1940. The said judgment was a final termination in the highest court of the State in which a decision could be had of a cause where a right, privilege and immunity was specially set up and claimed by petitioners under the Constitution of the United States, the particular right, privilege and immunity claimed by them being that they should not be deprived of property without due process of law. The jurisdiction of this Court, therefore, rests on Section 237 of the Judicial Code, as amended (28 U. S. C. A. 344, b), the material portion of which is as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution of the United States."

QUESTIONS PRESENTED.

1. Is a person deprived of property without due process of law, as guaranteed under Section 1 of the Fourteenth Amendment to the Federal Constitution, where a municipal

corporation enacts a penal ordinance prohibiting the ownership, maintenance, *or* operation of a pin-ball machine, which is used solely for the pleasure of the operator and which in no way involves a gambling transaction, and where the operator receives no prize or any other thing of any value whatsoever, and where the operator uses such machine for the sole purpose of demonstrating his own skill in such operation?

2. Can the owner of such machine who possesses same within the corporate limits of such city enjoin the enforcement of such ordinance prior to the effective date of such ordinance where the petition for relief sets out that the enforcement of such ordinance will destroy the property of petitioners?

3. Does the writ of certiorari lie to the judgment of the highest court of the state, which judgment refuses to pass upon the constitutionality of such ordinance because the petition for relief against such ordinance was filed after the passage of such ordinance but prior to the effective date thereof?

SPECIFICATION OF ERRORS.

Petitioners contend that the Supreme Court of Georgia erred:

1. In affirming the judgment of the trial court in holding that the petition did not set out a cause of action for relief by injunction.

2. In holding, in effect, that although a city ordinance may deprive a person of property without due process of law, such property owner is not entitled to equitable relief until after his property has been destroyed, the Supreme Court having held that the petition in this case did not set out a cause of action because it was filed prior to the effective date of the

ordinance and was based upon fears of destruction and not upon actual destruction of petitioners' property.

SUMMARY STATEMENT OF MATTER INVOLVED.

In June, 1939, the law making body of the City of Atlanta enacted a city ordinance, the pertinent parts of which are as follows:

> Section 1. That from and after July 1st, 1939, it shall be unlawful for any person, firm or corporation to own, maintain, *or* operate any pin-ball machine or similar machine, including all machines operated by depositing a coin therein for the playing of a game or the engaging in of any contest of chance or skill.

Two days prior to the date the above ordinance, by its terms, went into effect, a petition for equitable relief in this case was filed and alleged that the petitioners, twenty in number, owned approximately five hundred pin-ball machines and that such machines were leased to approximately four hundred merchants within the corporate limits of the City of Atlanta and that such machines were operated by the public for amusement only and that the users of such machines receive no prizes or anything of value from such machines and were operated solely and exclusively for the pleasure of the users, and further alleged that the lessees of said machines had threatened to cancel said leases and turn said machines back to the petitioners if said ordinance went into effect and prayed that said ordinance be enjoined and declared null and void because it contravened the Constitution of the United States which guaranteed that no person would be deprived of property without due process of law.

The trial court in the county where said municipality is lo-

cated dismissed said petition upon a general demurrer, the grounds of the demurrer being as follows:

1. That said ordinance was valid and did not contravene the Constitution of the United States.

2. That a penal ordinance could not be enjoined by a petition for equitable relief.

3. That said petition was prematurely filed in that it was based upon fears of destruction of property and filed before the effective date of the ordinance.

4. That the petitioners could defend prosecutions in the criminal Court and were not entitled to equitable relief.

The Supreme Court of the State of Georgia on the 26th day of March, 1940, affirmed the lower court and filed its written opinion holding that the petition was prematurely filed and refused to pass upon the constitutionality of the ordinance and in its opinion stated:

> "No decision is made or intended as to constitutionality of the ordinance."

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT AND BRIEF IN SUPPORT OF PETITION.

It is the contention of applicants for certiorari that the ordinance of the City of Atlanta in question which made it a penal offense to even own a machine which was used solely for pleasure, operated to deprive petitioners of their property without due process of law. The petition alleged that several hundred lease contracts were in force and effect within the corporate limits of the municipality and that the passage of

said ordinance destroyed said lease contracts. Assuming that this contention is correct, we respectfully submit that the refusal of the highest Court in Georgia to entertain a petition for equitable relief is subject to review by the Supreme Court of the United States.

The Supreme Court of Georgia, in the case of *Carey v. City of Atlanta,* 143 Ga. 192, held as follows:

> "While equity will not ordinarily enjoin a criminal prosecution, yet where the effect of such prosecutions would tend to injure or destroy the property of the person so prosecuted, or deprive him of the legitimate enjoyment of his property, equity will entertain a suit to inquire into the validity of the ordinance, and enjoin its enforcement."

This case involved a city ordinance restricting the use of certain property by colored people and Judge Atkinson, in his opinion, stated:

> "The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy and dispose of his property. Being of this character, it was void as being opposed to the due process clause of the Constitution; and the judge erred in refusing to grant the injunction."

In the case of *Cutsinger v. City of Atlanta,* 142 Ga. 555, the Court held:

> "While as a general rule a court of equity (or one exercising equitable jurisdiction) will not enjoin a proceeding before a recorder of a city, instituted for the purpose of punishing the violation of a penal ordinance, yet, in certain cases a court having equitable jurisdiction may intervene to protect property or property rights from irreparable damage by wrongful conduct of munici-

pal officers, although repeated prosecutions in the recorder's court, or threats thereof, may be used as a means of consummating the wrong."

This was a suit to enjoin the enforcement of a city ordinance with reference to boarding houses and lodging houses. In that case, the Supreme Court speaking through Judge Lumpkin held that the plaintiff was entitled to an injunction.

In the case of *Hasbrouck v. Bondurant,* 127 Ga. 220, the Court held:

> "The general rule is that equity will not interfere with the enforcement of criminal law, nor aid or obstruct the criminal courts in the exercise of their jurisdiction. But this rule does not deprive a court of equity of its power to protect private property, nor defeat its right to enjoin a continuing injury to property or business. When equity acts in such instances, it ignores the criminal feature and exercises its jurisdiction solely with reference to the effect of the act on the property or business."

In the case of *Georgia Railroad and Banking Company v. City of Atlanta,* 118 Ga. 486, the Court held:

> "Equity will not interfere with the enforcement of criminal laws, nor aid or obstruct criminal courts in the exercise of their jurisdiction; but that principle does not deprive a court of equity of its power to protect private property, nor defeat its right to enjoin a continuing injury to property or business."

In the case of *City of Atlanta v. Gate City Gas Company,* 71 Ga. 126, the Court held:

> "Where it is manifested that a prosecution and arrest is threatened for the sole purpose of preventing the exercise of civil right conferred directly by law, injunction is a proper remedy to prevent injury to the parties thus menaced."

In the case of *Peginis v. City of Atlanta,* 132 Ga. 302, the Court held:

> "The municipal council of Atlanta has no authority by resolution to declare a business which is useful and lawful per se to be a nuisance on account of the manner in which it is conducted, and thereupon to revoke the business license which has been granted to the proprietor."

This was a case where city council by a resolution, undertook to declare a certain business at a certain location in the City of Atlanta a nuisance and to revoke the license. The owner of the business filed an equitable petition to enjoin the enforcement of this ordinance and that irreparable damage would be done by closing his place of business.

Judge Atkinson, after discussing the powers of the city, stated:

> "The presiding judge should have granted an injunction restraining the defendants from stopping the conduct of the plaintiff's business or interferring therewith under or by virtue of the attempted revocation of his license."

We respectfully submit that the effect of the ordinance in question is to destroy a lease contract, which is property, and that the owners of such lease contracts are entitled to equitable relief.

We cannot see how it can reasonably be held that the ordinance was constitutional and did not destroy property. If this ordinance is valid, a municipality could pass a like ordinance with reference to checker boards and playing cards, and other amusement devices, no matter how harmless. The Court will bear in mind that this ordinance applies to ma-

chines in private homes and residences and does not come within the police powers of states and municipalities to regulate *public places.*

Respectfully submitted,

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Of Counsel:

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENTS IN OPPOSITION

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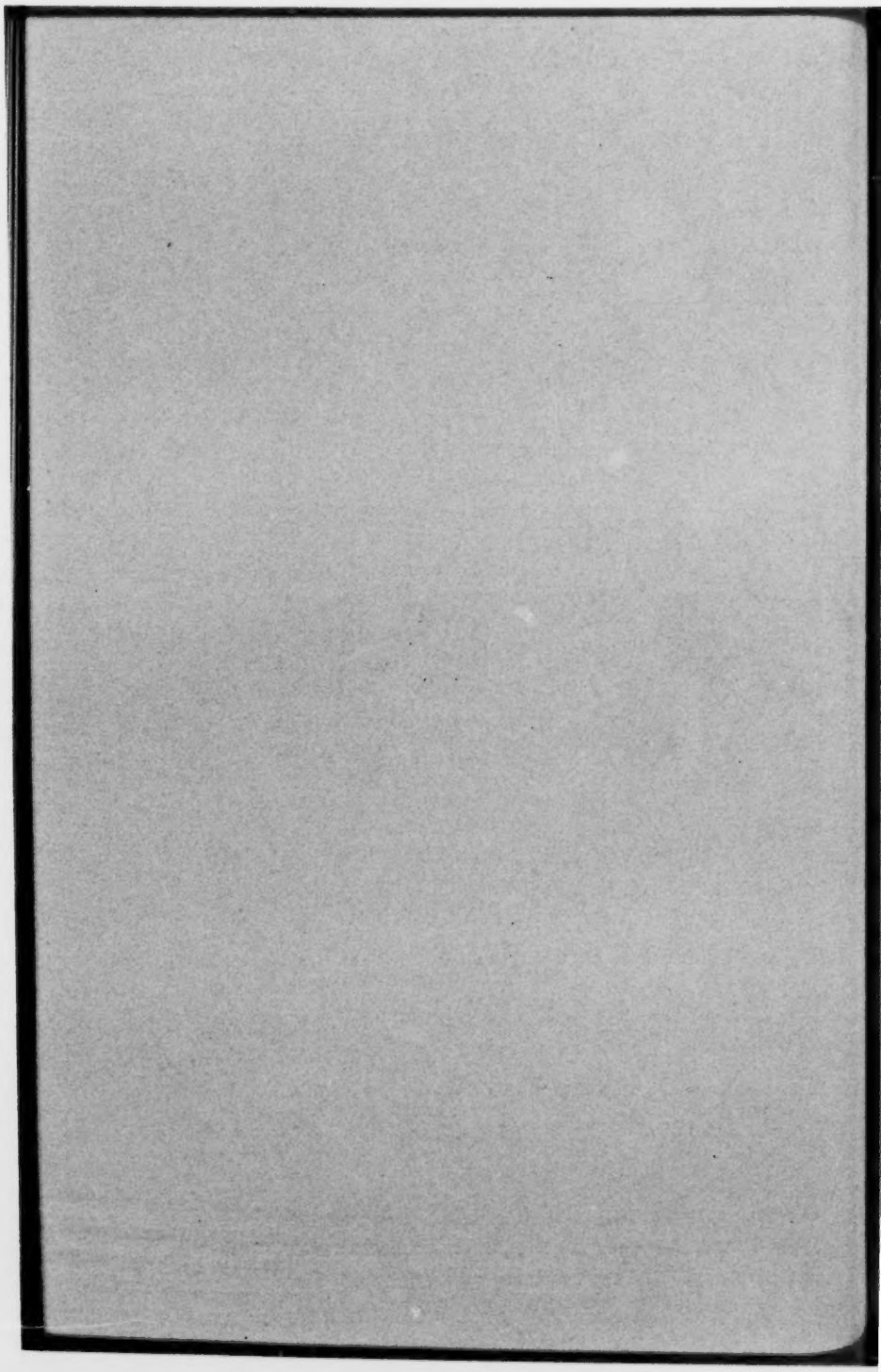

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Georgia dated March 13, 1940 (R. 17, 18), is reported at 189 Georgia 862 (7 S. E. (2d) 911).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 13, 1940 (R. 21).

The order of the Supreme Court of Georgia denying a petition for rehearing was entered on March 26, 1940 (R. 24).

The petition for certiorari was filed June 18, 1940. Notice

of the filing of the petition, together with a copy of the petition, printed record and supporting brief, was served on respondents June 22, 1940. The jurisdiction of this court is invoked by petitioners under Section 237 of the Judicial Code as amended (28 U. S. C. A. 344 (b)).

STATEMENT OF CASE

The statement of the matter involved in this petition for certiorari is correctly set out on pages 4 and 5 of said petition. The Superior Court of Fulton County, Georgia, which was the trial court, heard the case on the demurrers of the defendants, respondents herein, and on July 28, 1939, sustained the demurrers of the respondents herein and dismissed the petition (R. 12, 13). The Supreme Court of Georgia affirmed the judgment of the trial court on the ground that the petition for equitable relief was based not on interference with a property right, but on mere fear or apprehension of such interference. (R. 18).

The Supreme Court of Georgia specifically stated in its opinion:

> "No decision is made or intended as to constitutionality of the ordinance." (R. 18).

REASONS WHY THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

No federal question was decided by the Supreme Court of Georgia. On the contrary the court specifically declined to pass on the Federal question which was presented, and based its decision purely on matters of state practice and state law. There is, therefore, no question which is reviewable by this court in this case.

See *Brown v. Atwell*, 92 U. S. 327, 23 L. Ed. 511, wherein the court said:

> "We have often decided that it is not enough to give

us jurisdiction over the judgments of the state courts, for the record to show that a Federal question was argued or presented to a court for decision. It must appear that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it."

To the same effect see:

Citizens Bank v. Board of Liquidation,
98 U. S. 140, 25 L. Ed. 114.

Murdock v. Memphis,
20 Wall. 590, 87 U. S. 429, 22 L. Ed. 429.

The case of *Chouteau v. Gibson,* 4 S. Ct. 340, 111 U. S. 200, 28 L. Ed 400, holds as follows:

"To give the supreme court jurisdiction on the ground that a federal question is involved, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

See also to the same effect:

Adams County v. Burlington & M. R. R. Co.,
5 S. Ct. 77, 112 U. S. 123, 28 L. Ed. 678.

Detroit City Ry. Co. v. Guthard,
5 S. Ct. 811, 114 U. S. 133, 29 L. Ed. 118.

CONCLUSION

It is respectfully submitted, therefore, that in order for this court to assume jurisdiction in this case it must appear that a federal question not only was raised, but was decided, or its decision was necessary to a determination of the case in the state court. Although a federal question was presented to the state court it appears on the face of the record that this question

was not decided. Nor was a decision of this federal question necessary to a determination of the case in the state court, the decision having turned purely on a question of state practice and state law. We, therefore, respectfully submit that under the decisions of this court no question is presented which is reviewable by this court.

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